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No. 95-355

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

KATHLEEN MCKOWN, WILLIAM MCKOWN, MARIO TOSTO, AND QUINNA LAMB,

Petitioners,

v.

DOUGLASS G. LUNDMAN, AS TRUSTEE FOR THE NEXT OF KIN OF IAN DOUGLASS LUNDMAN, DECEASED,

Respondent.

On Petition for a Writ of Certiorari to the Minnesota Court of Appeals

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REPLY BRIEF FOR THE PETITIONERS

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1. This case involves the needless imposition of crippling liability on four individuals for religious *belief* and *expression* — as well as conduct. Under the decision below, Christian Science parents, practitioners, and nurses are required, under penalty of civil damages, to form judgments inconsistent with their sincere beliefs as Christian Scientists, to express and persuade others to adopt those beliefs, and to act contrary to those beliefs. All this is quite unnecessary to achieve the state's interest in protecting children who become

seriously ill. Minnesota law now requires parents who rely on spiritual treatment for their children to report all serious or life-threatening conditions to state health authorities, who are able to order medical intervention in appropriate cases without involving parents (let alone Christian Science professionals) directly in medical decisionmaking antithetical to their spiritual approach to healing.

We showed in the Petition for Certiorari that this legislative measure, which was a careful and deliberate effort to accommodate the free exercise of religion, is *both* less burdensome on religious belief and practice *and also* effective from the state's perspective. It was disregarded by the Court of Appeals, however, for the patently inadequate reason that it might not "always work." Pet. App. 28a.[1] The lower court's conclusory treatment of this legislative accommodation reflects a widespread confusion and inconsistency among state and lower federal courts regarding the constitutional requirement that states may not adopt measures burdening the exercise of First Amendment rights where less restrictive alternatives are available. This Court's review is urgently

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[1] Respondent asserts that Petitioners failed to raise this less restrictive alternative argument under the Free Exercise Clause in the court below, in violation of Sup. Ct. R. 14(h). Mem. in Opp. 3 n.3. However, this argument was briefed in both the District Court and the Court of Appeals and was expressly adopted by all the Petitioners. See Court of Appeals Brief of Appellant First Church of Christ, Scientist at 21-23; Brief of Appellants Kathleen McKown, William McKown, and Mario Tosto at 31; Joint Brief of Quinna Lamb Giebelhaus, Clifton House, Inc., and James Van Horn at 18 n.21. The argument also was addressed on its merits by the Court of Appeals. Pet. App. 28a. The issue is thus properly presented here. See *Orr* v. *Orr*, 440 U.S. 268, 274-75 (1979); *Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974); *Ward* v. *Village of Monroeville*, 409 U.S. 57, 61 (1972) (an issue that was addressed in the opinion of the state court of last resort is properly presented for this Court's review).

needed to clarify this important, but widely misunderstood and neglected, protection for constitutional rights.

Respondent offers two reasons why the Court should not review the Court of Appeals' holding under the First Amendment, neither of which has merit. First, Respondent misleadingly informs the Court that the Religious Freedom Restoration Act (RFRA) is unconstitutional (Mem. in Opp. 3-4), oddly overlooking the fact that Petitioners' federal claim is based on the First Amendment and not on the RFRA. Indeed, the RFRA is not even cited in the Petition. As noted in the Petition, the less restrictive alternative analysis is firmly established in this Court's precedents interpreting the Free Exercise Clause. See Pet. 10.

The Free Exercise Clause applies to this case because the common law principles under which Petitioners were held liable, as well as the legislative provisions to which they are related, make specific reference to religion and are, therefore, *not* "neutral laws of general applicability" within the meaning of *Employment Division v. Smith*, 494 U.S. (1990). See Pet. 10 n.6. The Court of Appeals expressly rejected application of a generalized "reasonable person" standard to this sort of case on the ground that it does not properly "tak[e] account of religious belief." Pet. App. 48a.[2] Moreover, jury application of generalized negligence principles — even under a "reasonable person" standard — would involve precisely the sort of individualized judgment about conduct to

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[2] Respondent's observation that "[t]he *trial court* imposed liability on Petitioners by applying the reasonable person standard of negligence, a law of neutral applicability that is neutral toward religion" (Mem. in Opp. 4 (emphasis added)), is beside the point, since the Court of Appeals corrected that erroneous ruling as a matter of state law. As the case comes to this Court, the common law of Minnesota, as authoritatively interpreted by the state's courts, makes specific reference to religion and is therefore not "neutral and generally applicable."

which the older standard of *Sherbert v. Verner*, 374 U.S. 398 (1963), continues to apply. See *Smith*, 494 U.S. at 884 (*Sherbert* analysis will be applied where the law at issue provides for an "individualized governmental assessment of the reasons for the relevant conduct").

Second, Respondent claims that application of a less restrictive alternative would be unconstitutional under the Establishment Clause and the Equal Protection Clause. This argument is frivolous. This Court has repeatedly held that accommodation of religion is legitimate and sometimes even required. The Court has held that alleviation of a burden on the free exercise of religion is both a permissible government purpose and a permissible effect under the Establishment Clause. See *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1 (1989); *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 335 (1987). Citation of the Equal Protection Clause adds nothing to this argument: the Court has never held that an accommodation of religion, otherwise permissible under the First Amendment, violates the Fourteenth.

The feebleness of Respondent's arguments underscores the need for review in this case. Beyond his assertions about the unconstitutionality of the RFRA and of less restrictive means analysis, Respondent can offer no serious defense of the dismissive treatment by the courts below of Petitioners' First Amendment rights. If the constitutional requirement of less restrictive alternatives means anything, it must give protection against harsh and punitive treatment of sincere religious practice where the legislature itself has concluded that an alternative approach is adequate and indeed superior.

2. Respondent further contends that Petitioner Tosto's liability is not predicated on "clergy malpractice." Mem. in Opp. 6. Yet in his opening and closing statements at trial, Respondent's counsel contended that Tosto and others were negligent by allegedly deviating from Christian Science

practice in not suggesting a change from Christian Science treatment, not visiting Ian frequently enough, and not allowing Ian to decide his own type of care. 7/19 (p.m.) T.48.; 8/17 T. 143-145, 149, 154-156. During cross-examination, Respondent's counsel asked Tosto if his treatment deviated from a January 24, 1980 letter from the Chairman of the Christian Science Board of Directors to "All Teachers, Practitioners, and Nurses listed in the Christian Science Journal" or a booklet entitled "Legal Rights and Obligations of Christian Scientists in Minnesota," published by the Christian Science Committee on Publication for Minnesota. 8/3 T.70-74. On this record, it is remarkable that Respondent Lundman can deny that this case is about the alleged negligence of a Christian Science practitioner (recognized as clergy under Minnesota law), in the performance of his religious functions.

Nor can Respondent fairly dispute that the decision below turned upon the doctrine of clergy malpractice. Petitioner Tosto was involved in this case solely because he was engaged by Mrs. McKown for the purpose of prayer and spiritual treatment. In finding Tosto negligent because he did not persuade Petitioner Kathleen McKown "to call in providers of conventional medicine" or "personally call for either a doctor or the authorities" when he should have realized that "Christian Science care was not succeeding," (Pet. App. 38a), the Court of Appeals effectively imposed on Tosto, on account of his religious functions, civil obligations he would not otherwise have borne. Measuring the reasonableness of a Christian Science practitioner's conduct of his spiritual calling is nothing other than a nonjusticiable, unconstitutional claim of clergy malpractice.

3. Finally, respondent asserts there is no constitutional significance to the fair notice issues raised by this case because this "case involves application of the common law — a protean source of law responsive to social needs." Mem. in Opp. 7). The apparent notion that common law claims are

not subject to due process requirements has no basis in reason or precedent. Due process requires fair notice that certain conduct is sanctionable — regardless of whether the sanction is imprisonment for manslaughter (the indictment at issue in *State* v. *McKown*, 475 N.W.2d 63 (Minn. 1991), *cert. denied*, 502 U.S. 1036 (1992)) or a $1.5 million judgment for wrongful death based on the same facts as the manslaughter charge. "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of [tort]." *New York Times* v. *Sullivan*, 376 U.S. 254, 277 (1964).

That Minn. Stat. §§ 609.378 and 626.556 do not on their face declare spiritual healing reasonable under all circumstances is not the point. The issue is the contradiction between the pronouncement in the companion criminal case that it would violate Due Process to impose a criminal penalty upon one who relied upon Minnesota's accommodation statute (because it permits reliance upon spiritual healing no matter how serious the illness) and the holding below that, at some unspecified point, Petitioners should have realized that Christian Science care was not working and that the accommodation statues do not apply if an illness is severe. Due process prohibits official misleading. The State, through these statutes, officially authorized parents and guardians to "select and depend upon" spiritual treatment as health care for children. There was a fundamental due process violation when the state court subsequently subjected Petitioners to civil liability notwithstanding their actual and reasonable reliance on the explicit provisions of these spiritual treatment statutes. The same constitutional guarantees of fair notice should have caused dismissal of both the criminal and civil cases.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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